86-1048

NO.

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October, 1986 Term

JEWEL M. COOPER

Petitioner

v.

DIAMOND M COMPANY

Respondnet

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

This writ of certiorari is sought pursuant to the adverse ruling of the Fifth Circuit Court of Appeals denying recovery to the plaintiff, Jewel Cooper, on the basis that 46 USC Section 763(a) should be given retrospective application instead of prospective application.

The issue presented for this Honorable Court to determine is 1) whether or not a newly enacted statute is to be given retrospective application, in the absence of any legislative intent to do so, when such application destroys a substantive right of the claimant and thus destroying the chance of any recovery from the tortfeasor; and 2) whether or not the district court was correct in summarily dismising the petitioner's suit when there was a factual dispute in existence as to whether or not the defendnat, Diamond M Company, was prejudiced by the maintenance of the petitioner's suit.

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JURISDICTION OF THE COURT

The jurisdiction of the United States Supreme Court is invoked pursuant to the Supreme Court rule 17(a) which authorizes a party to invoke the supervisory power of this Honorable Court when there are conflicting opinions between two different court of appeals circuits. This conflict has arisen between the 11th Circuit Court of Appeals and the 9th Circuit Court of Appeals. These decisions are in direct conflict with each other.

Judgment was entered into by the Eastern District Court of Louisiana dismissing the plaintiff's claim. Plaintiff then filed a motion of appeal to the Fifth Circuit Court of Appeals. Oral Argument was granted to the plaintiff and the Fifth Circuit reversed in part and remanded in part, handing down its decision on September 8, 1986. It is from this decision that the plaintiff applies for writs of certiorari to attempt to have her unseaworthiness claims relitigated. The Fifth Circuit affirmed the district court's decision that the unseaworthiness claim was barred under the newly enacted 46 USC Section 763(a).

STATUTES CITED IN PETITION

46 USCA Section 763(a)

"Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date of the cause of action accrued."

STATEMENT OF THE CASE

On November 14, 1984, the plaintiff, Jewel Cooper, filed her complaint for damages for personal injury in the United States District Court for the Eastern District of Louisiana, based upon an an accident which occurred on April 4, 1979. Named as defendant in the suit was Diamond M Company, a foreign corporation authorized to do business in the State of Louisiana. Plaintiff invoked the jurisdiction of the Court pursuant to the Jones Act, 46 U.S.C. Section 688, diversity of citizenship and under the General Maritime law with pendent and ancillary jurisdiction over claims under Louisiana Law arising out of the same cause of action. (Record, pp. 1-3)

Defendant filed his first Motion for Summary Judgment on March 1, 1984 and the plaintiff filed a Motion in Opposition to the Motion for Summary Judgment on March 16, 1984. (Record, pp. 9-19) This motion of the defendant was heard and, on June 7, 1984, the Court granted the Motion dismissing the plaintiff's Jnes Act claim. However, the Court granted the plaintiff an additional ten days to show excuse for the delay and what prejudice the defendant was caused because of this delay. (Record, pp. 20-22)

The plaintiff filed a Supplemental and Amending Complaint on June 9, 1984, alleging that no prejudice had actually resulted and the defendant filed a second Motion for Summary Judgment on July 23, 1984, attempting to dismiss the case under the doctrine of laches.

A pretrial conference which was initially set for hearing on August 15, 1984, was later rescheduled for August 28,1984. (Record, pp. 33-38) In preparation for the

scheduled conference, the defendant filed a Memorandum in Support of Motion for Summary Judgment, (Record, pp. 39-54) The defvendant filed a Supplemental and Amending Memorandum on August 24, 1984. (Record, pp. 65-66) After the pretrial conference was held on August 28, 1984, the Court denied the defendant's Motion for Summary Judgment and rescheduled trial and set another pretrial conference to be held on November 8, 1984. (Record, p. 72)

A second Supplemental Memorandum in Support of a Motion for Summary Judgment was filed on October 9, 1984, attempting to dismiss the plaintiff's case under the doctrine of laches and based on the theory that the delay was inexcusable and prejudicial to the defendant. (Record, pp. 83-87) The plaintiff filed a Memorandum attempting to show that the defendant was not prejudicial because of the delay on October 11, 1984. (Record, pp. 88-92)

A pretrial conference was held in preparation for trial and the Court ruled on the defendant's last Motion for Summary Judgment in favor of the defendant stating that the delay was unreasonable causing unnecessary prejudice to the defendant, Diamond M Company. (Record, pp. 93-110) The plaintiff filed a Motion for Rehearing on April 3, 1985, which was denied and he subsequently filed this pending appeal. (Record, pp. 113-120 and 268-276)

Subsequent to the dismissal by the District Court, Eastern District of Louisiana, the petitioner, Jewel Cooper, appealed the decision to the Fifth Circuit Court of Appeals. Pursuant to a Request for Oral Argument, same was granted and supplemental briefs were filed as required by the court. On appeal, the fifth circuit attempted to ascertain when the plaintiff's cause of action arose for her

maintenance and cure claim and also attempted to determine what statute of limitations would govern the accident in which the petitioner was involved.

After oral argument was had, the fifth circuit reversed the district court's dismissal as to her maintenance and cure claim as they determined that Ms. Cooper's right to compensation did not begin until April 27, 1983. The court, however, affirmed the district court's decision as far as the petitioner's right to claim for unseaworthiness is concerned. The court held that 46 USCA Secton 763(a) would be applied retrospectively to the petitioner's accident. the court's decision was based on the fact that such retrospective application would not destroy any of her substantive rights. The decision was handed down on September 8, 1986, and the petioner now seeks for writs of certiorari.

ARGUMENT

The main issue that the plaintiff petitioner raises in this request for writs is whether a federal statute, more specifically 46 USCA 763(a), should be given retrospective application when such application will destroy rights of the petitioners and thus leaving said petitioner in a state of destitute with virtually no where to turn. Prior to the enactment of 763(a), the statute of limitations governing maritime torts, such as unseaworthiness claims and claims under the general maritime law, were governed by the equitable doctrine of laches. Under this doctrine, the movant had the burden of establishing the unreasonableness in bringing this claim and the prejudicial that has resulted from this delay. *Mobile Oil Corp. v. Department of Energy* 728 F.2d. 1477 (1983) cert denied 194 S.Ct. 3545.

46 USCA 763 was repealed in October of 1980 and it was subsequently replaced with 4 USCA 763(a). Under 763(a), a general maritime tort was given a 3 year statute of limitations in which to file suit to recover damages occasioned by this tort. This 3 year statute of limitations in section 763(a) also covered claims of unseaworthiness. Section 763 (a) reads in its entirety as follows:

> "Unless otherwise specified by law a suit for recovery of damage for personal injury or death or both, arising out of a maritime tort shall not be maintained unless commenced within 3 years from the date the cause of action occurred."

The accident which forms the basis of this suit occurred on April 4, 1979 when the doctrine of laches was the governing statute of limitations. Subsequent to this accident, Section 763(a) was enacted, establishing the new statute of limitations period as 3 years for general maritime torts.

As a result of the enactment of section 763(a) the courts were faced with the decision of whether to grant retrospective application or prospective application to the statute. In the absence of clear congressional intent that a newly enactment statute is to be given retroactive application, it is the rule that only prospective belief will be granted *Cox v. Schwerker* 684 F.2d 310 (1982) *Corpus v. Estelle* 605 F.2d 175 (5th Circuit) cert denied, 445 U.S. 910,100 S.Ct. 1284, 63 L.Ed. 2d 605 (1979). Prospective application is generally presumed to avoid any unfairness that may be accompanied by the retrospective application of new enacted statutes. *U.S.V. Donnelly's Estate* 387

U.S. 286, 90 S.Ct. 1033, 25 L.Ed. 2d 312 (1970).

In determining whether retrospective application should be applied to the case at bar, the Fifth Circuit considered two recent decisions dealing with retrospective applications. The first decision was *Fordham v. Belcher Co.* 710 F.2d 709 (11th Circuit, 1983). In Fordham the court refused to apply Section 763(a) retrospectively to bar the plaintiff's claim because "section 763(a) contained no effective date and no suggestion that it should cut off claims which had accrued before its enactment." Furthermore, since there was not a clear unequivocal statement requiring retroactive application of this statute, the court found that only prospective application could be given. In making a determination that prospective application would be given to section 763(a) thus, allowed the plaintiff to proceed with his claim and enforce his substantive rights afforded him under the law.

The *Fordham case,* supra, clearly operates in favor of the plaintiff, Jewel Cooper. The problem, however, arose when the court was faced with *Friel v. Cessna Aircraft Co.* 751 F.2d 1037 (1985) It is the plaintiff, Jewel Cooper's contention that the court of appeals decision to affirm the dismissal of her suit was the result of an improper interpretation of the *Friel* case. In *Friel,* the court was also faced with a decision of whether or not 763(a) should be given retroactive application. The ninth circuit stated:

> "It is a rule of construction that statutes are ordinarily given prospective effect. But when a statute is addressed to remedies or procedures *and* does not otherwise alter substantive rights it will be applied to pending cases."

> "The purpose behind the rule of construction is clear. Non-retrospective application of a statute presents the assigning of a quality or effect to act or conduct which they did not have or did not contemplate when they were performed."

The court in *Friel* felt that no substantive rights had been altered as a result of the retroactive application because 763(a) was enacted before the plaintiff's claim prescribed under the old 2 year statute of limitations. Thus, the court reasoned that because 763(a) was enacted before the current 2 year statute of limitations had run the plaintiff's substantive rights would not be, in any way, altered by the retroactive application. This allowed the plaintiff to proceed with his claim to enforce his rights maintained under the law.

It is important to note at this time that the court, in writing its opinion, made specific reference to the *Fordham case,* supra, in Footnote #4 which reads:

> "Appellants point to several cases where the court refused to give Section 763(a) retrospective application. See *Fordham v. Belcher Towing Co.* 710 F.2d. 709, 710 (11th Cir. 1983). These cases dealt with whether 763(a) could be used to cut off actions which were otherwise viable under the doctrine of laches. *These are exactly the 'substantive rights' a court must look to in determining whether to apply a remedial statute retroactively.* In this case, appellants had acquired no such substantive rights." (emphasis added)

This clearly indicates that the court was under the impression that while no substantive rights were altered in *Friel*, supra, it did in fact feel that such rights were altered in *Fordham*, supra. Thus retroactive application was not warranted in *Fordham*, supra.

It is further pointed out that the *Fordham*, supra, decision more closely parallels that of the plaintiff, Jewel Cooper. Just as in *Fordham*, supra, Ms. Cooper sustained injury prior to the enactment of 763(a) and subsequent to her filing suit, 763(a) was enacted. The court in *Fordham*, wa of the opinion that to give retroactive application in this case would destroy serious substantive rights of the plaintiff. It is additionally important to note that in giving the retrospective application in *Friel*, supra, the plaintiff was still allowed to proceed, where as Ms. Cooper will be left destitute with virtually nowhere to turn.

Furthermore upon determining that retrospective application should not have been afforded to the situation of Ms. Cooper, it is additionally requested that this case be remanded to determine whether or not the granting of the Summary Judgment was correctly granted by the district court. The district court for the Eastern District of Louisiana granted a summary judgment where a serious factual dispute existed as to whether or not the defendants were prejudiced by the plaintiff's suit.

In order for a Motion for Summary Judgment to be granted, the party seeking the judgment bears the burden of demonstrating that there is no dispute as to any material fact in the case. *Adicks vs. S. H. Kress & Co,* 398 U.S. 144, 1980 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In assessing whether the movant has met his burden, the Courts

should review the evidence and all factual inferences therefrom in the light mosst favorable to the party opposing the motion and all reasonable doubts about the facts should be resolved in favor of the non-movant. *Clemons v. Dougherty County, Georgia*, 684 F.2d 1365, 1368 (11th Cir., 1982).

When a doubt has been created as to the facts in question, the Court has no duty or function to try or decide factual issues. Its only duty is to determine whether or not there is an issue of fact to be tried, *Gross v. Southern Railway Company*, 414 F.2d 292, 297 (5th Cir., 1969).

The equitable doctrine of laches gives use to the possibilities of facts which may be in dispute, requiring such issues to be determined by the trier of fact. Under this doctrine, before the Court will sustain such a defense, the movant must show that there was an unreasonable delay in bringing the action and as a result of the delay the defendant is prejudiced. *Mobile Oil Corporation v. Department of Energy*, 728 F.2d 1477 (1983) Cert. denied 194 S.Ct. 3545.

In the present suit, the defendant moved for a Motion for Summary Judgment, attempting to dismiss the plaintiff's General Maritime claims of unseaworthiness and maintenance and cure based on the premise that they were unduly prejudiced because of the delay in bringing this claim. The defendants claimed they were prejudiced because the chief steward who supervised the plaintiff and operations of the kitchen where she worked had subsequently died. They also claim that the deceased supervisor was in charge of making necessary repairs on equipment in the kitchen such as the refrigeration unit which caused the

slip and fall. However, although he was supervisor of these types of repairs and Miss Cooper, the defendant failed to state that this supervisor, Burt Boeckl, was not even on the Barge when the accident occurred. Furthermore, he had not been on the Barge since the refrigeration unit malfunctioned and caused the water to be on the floor. It is hard to say that Mr. Boeckl's role in this matter and the subsequent loss of his testimony is prejudicial to the defendant in any way.

Additionally, this accident was reported to the proper authorities and supervisors, within the required time limits and Diamond M failed to conduct an investigation to determine the cause and/or causes of the accident. They even failed to take the necessary steps to correct defectsive condition of the floor which caused the accident. If there is any prejudice, it is very slight and caused simply by the defendant company's failure to investigate and determine the cause of the accident in anticipation of litigation.

In the case of *Powell v. City of Key West Florida*, 434 F.2d 1975 (5th Cir., 1970), the Court held that assertions as to whether the defendant was prejudiced created questions of act precluding summary judgment based on laches. In *Powell*, supra, the plaintiff filed suit more than six years after the accident in question occurred and the Court summarily dismissed the claim. On appeal, the Fifth Circuit held that the granting of the Motion for Summary Judgment was improper because the evidence offered by both sides presented an issue of fact to be decided.

Plaintiff respectfully submits that the case at bar also presents a reasonable dispute as to the facts. Under the holding of *Powell*, supra and *Gross*, supra, the only

body capable of resolving this factual dispute of whether or not there has been an unreasonable delay and whether or not the defendant is prejudiced, is the jury and it is requested that this Court remand the case on this point.

In light of this, the plaintiff, Jewel Cooper, respectfully requests that this time she is in a destitute state. She is permanently injured as a result of this accident and is incapable of future employment and she has and will incur in the future serious medical expenses that she will not be able to account for.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jewel M. Cooper,
PLAINTIFF—Appellant,
v.
Diamond M. Company,
Defendant-Appellee.

No.85-3299
OPINION

Filed September 8, 1986

Before: Thomas M. Reavley, Carolyn Dineen Randall and W. Eugene Davis, circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Eastern District of Louisiana
George Arceneaux, Jr., District Judge, Presiding

SUMMARY

ADMIRALTY

Appeal from a district court's entry of summary judgment against appellant's unseaworthiness claim and her maintenance and cure claim. Affirmed in part , and reversed and remanded in part.

Appellant Jewel M. Cooper (Cooper) was employed as a steward by appellee Diamond M Company (Diamond M) when, on April 4, 1979, she sustained injuries on a Diamond M vessel. She slipped and fell in water that allegedly leaked from a refrigeration unit; the accident was not

witnessed. According to Cooper, Diamond M assured her that she would have a job as long as she wanted. Cooper continued to work for Diamond M "in pain" until April 27, 1983, receiving "compensation" of two hundred dollars per week from Diamond M from May 20, 1983, until September of 1983, when she was fired. On November 14, 1983, over four years after the accident, Cooper sued Diamond M for personal injury, alleging an unseaworthiness claim and a maintenance and cure claim. Diamond M maintained that her claims were barred either by laches or by the statute of limitations embodied in 46 U.S.C. §763a. Although holding that § 763a did not apply to bar the action, the district court found that laches did.

[1] Section 763a. enacted October 6, 1980, provides a three-year limitation's period for personal injury actions arising out of a maritime tort. Cooper's unseaworthiness action accrued prior to the statute's date of passage. [2] Nevertheless, a newly-created statute of limitation will not violate the Constitution by divesting a vested right if it allows a reasonable time for those affected by it to assert their rights. By the terms of § 763a. Congress indicated that three years would be a reasonable prescriptive period for asserting an unseaworthiness claim. Thus, a claim that accrued prior to the date of passage of § 763a remains viable only for three years after the date of passage. Because Cooper filed her suit more than three years after the passage of § 763a, her unseaworthiness claim is barred. [3] The maintenance and cure claim, however, was timely filed. In determining that this claim was barred by laches, the district court seemed to assume that the claim accrued on the date that Cooper slipped and fell in 1979. However, Cooper was not incapacitated by the fall, but instead continued to work, albeit "in pain," until April 27, 1983. Thus

her claim for maintenance and cure did not accrue until April 27, 1983, when she became "incapacitated to do a seaman's work."Using this latter date, her maintenance and cure claim was filed within the three-year statute of limitation embodied in § 763a.

OPINION

CAROYLN DINEEN RANDALL, Circuit Judge:

Appellant Jewel M. Cooper appeals from the district court's entry of summary judgment. We affirm in part, and reverse and remand in part.

Jewel M. Cooper was employed as a steward by appellee Diamond M Company. On April 4, 1979, Cooper sustained injuries on the Diamond M Vessel, Century, when she slipped and fell in water that had allegedly leaked from a refrigeration unit. The accident was not witnessed; another employee walked into the refrigeration unit to find Cooper already on the floor. Cooper explained that she had slipped and fallen, and reported the accident to the barge captain.

According to an affidavit filed by Cooper, Diamond M assured Cooper that she would have a job as long as she wanted. Cooper continued to work for Diamond M "in pain" until April 27, 1983, receiving "compensation" of two hundred dollars per week from Diamond M from May 20, 1983, until September of 1983, when she was fired.

On November 14, 1983, over four years after the accident, Cooper sued Diamond M for personal injury pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime

law. Diamond M moved for summary judgment, claiming that Cooper's suit was untimely. The district court granted the motion as to the Jones Act claim, but denied it as to the unseaworthiness claim, allowing Cooper an additional ten days to amend her complaint to show that this latter claim was not barred by laches. Cooper amended her complaint to allege that her delay in filing suit was excusable and that the delay did not prejudice Diamond M. In a later amendment, Cooper added a maintenance and cure claim.

Diamond M again moved for summary judgment in July 1984, maintaining that Cooper's claim was barred either by laches or by the statute of limitations embodied in 46 U.S.C. § 763a. To support its claim of laches, Diamond M relied primarily on the affidavit of Kenneth A. Bradley, the claims manager of Diamond M. The affidavit stated that Cooper's supervisor, Hubert Boeckle, an important witness, had died on April 23, 1982. According to the affidavit, Boeckle would have had knowledge both of Cooper's post-accident condition and of the state of the equipment that had allegedly led to Cooper's accident.

In August 1984, the district court orally denied in part Diamond M's motion, ruling that 46 U.S.C. §763a, enacted October 6, 1980, did not apply to bar Cooper's claim. Turning to the laches issue, the court ruled that Cooper's delay in filing suit was not excusable. The court, however, gave Cooper additional time for discovery on the question of prejudice to Diamond M.

On March 7, 1985, Cooper and Diamond M filed a joint motion for summary judgment, Cooper had submitted no additional affidavits or depositions contradicting the evidence of prejudice contained in the Bradley

affidavit. Accordingly, on April 1, 1985, the district court granted summary judgment for Diamond M. ruling that Cooper had failed to carry her burden of showing that Diamond M had not been prejudiced by the delay in suit. The court also rejected Cooper's claim that the obligation to provide by the tenyear Louisiana prescriptive period for contractual claims rather than by laches. Cooper now appeals the district entry of summary juegment against her on the unseaworthiness and maintenance and cure claims.

II.

Summary judgment is appropriate if the full record discloses that there is no genuine isue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On review, we apply the same test as does the district court. Because we find Cooper's unseaworthiness claim to be time-barred by 46 U.S.C. § 763a, we affirm the district court's entry of summary judgment against Cooper on this claim.[1] However, because we conclude that the district court did not apply the correct legal standard in determining when the maintenance and cure cause of action accured, we must reverse the district court's entry of summary judgment on the maintenance and cure claim.

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[1] If we find the order of summary judgment correct, we can affirm the order althrough we disagree with the reasons given by the trial judge. *Shelly v. McAdory*, 781 F.2d 1053, 1054 (5th Cir. 1986). Moreover, our conclusion that Cooper's unseaworthiness claim is governed by § 763a rather than by the analogous Jones Act statute of liomitations and the doctrine of laches is not altered by our decision in *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984). In *Albertson*, we invoked the doctrine of lachjes to bar a claim which accrued in 1969 and was sued in 1981; the applicability of § 763a, however, was not an issue before us in *Albertson*.

[1] Section 763a, enacted October 6, 1980, provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

Only two circuit courts have addressed, with differing conclusions, the question whether § 763a should be applied to a cause of action, such as Cooper's unseaworthiness action, which accrued prior to the statute's date of passage. In *Fordham v. Belcher Towing Co.*, 710 F.2d 709 (11th Cir. 1983), the Eleventh Circuit refussed to apply § 763a to a negligence claim which had accrued in 1978, instead remanding the suit for determination of whether it was time-barred in accordance with the law of laches. In *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037 (9th Cir. 1985), the Ninth Circuit did apply § 763a to ectend the period of limitations applicable to a cause of action which accrued in July 1980, three months prior to the passage of §763a, explaining: "when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases." 751 F.2d 1039.

[2] We find that § 763a applies to Cooper's unseaworthiness claim. A newly-created statute of limitation will not violate the Constitution by divesting a vested right if it allows a reasonable time for those affected by the Act to assert their rights. *Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984). In the instant case, Congress by the very reasonable prescriptive period for aserting an unseaworthiness claim. We thus find that a claim which accrued prior to the date of passage of § 763a

remains viable for three years after the date of passage of that statute and thereafter succumbs to the absolute bar impressed by Congress. *See Fust,* 736 F.2d at 1100.[2] Because Cooper filed in November 1983, more than three years after the passage of § 763a, we find her unseaworthiness claim to be time-barred.[3]

We find that Cooper's maintenance and cure claim, however, was timely filed. "Maintenance and cure is disigned to provide a seaman with food and lodging when he becomes sich or injured in the ship's serivce; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962). "Maintenance is a *per diem* living allowance, paid so long

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[2] In addition, as the Ninth Circuit further observed in *Friel v. Cessna Aircraft Co.,* 751 F.2d 1037 (9th Cir. 1985), those cases refusing to give § 763a retrospective application "dealt with whether § 763a could be used to cut off actions which were otherwise viable under the doctrine of laches. "751 F.2d at 1039 n.4 (emphasis omitted). We agree with the district court that, in the absence of application of § 763a. Cooper cannot here sustain her burden of proff under laches to show reasonable delay and absence of prejudice. Thus, this is not a case which would be "otherwise viable under the doctrine of laches."

[3] Cooper's brief can be read to allege that Diamond M's promise to provide her with employment as long as she wished should either toll § 763a or estop Diamond M. from relying on § 763a. We do not agree. We find that Cooper's allegation is not sufficient to toll the statute. And while "[t]he equitable principle of estoppel prevents a defendant whose representations or other conduct have caused a plaintiff to delay filing suit until after the running of the statutory period from asserting that bar to the action," in order "to create an estoppel, the conduct of the defendnat must be so misleading as to cause the plaintiffs' failure to file suit." *Sanchez v. Loffland Bros Co.,* 626 F.2d 1228, 1231 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981). We do not find Diamond M's conduct so misleading as to have caused Cooper's delay in filing suit; thus, Diamond M can, as it did before the district court and does before us now, invoke the bar of § 763a.

as the seaman is outside the hospital and has not reached the point of 'maximum cure.' Cure involves the payment of therapeudic, medical and hospital expenses not otherwise furnished to the seaman, again, until the point of 'maximum cure.' " *Pelotta v. L & N Towing Co.*, 604 F.2d 396 (5th Cir. 1979). "The Supreme Court has long recognized the importance of these remedies ... and has declared that the doctrines of maintenance and cure are to be liberally construed to benefit the seaman." *Caufield v. AC & D Marine, Inc.* 633 F.2d 1129, 1132 (5th Cir. 1981). "When there are ambiguties or doubts, they are resolved in favor of the seaman." *Vaughn*, 369 U.S. at 532. Maintenance and cure are due without regard to negligence or unseaworthiness, and the claim for maintenance and cure cna be filed separately from whatsoever Jones Act or unseaworthiness claims are also available. *Pelotto*, 604 F.2d at 402; 1B *Benedict on Admiralty* § 43 at 4-10 (1985).

[3] In finding Cooper's maintenance and cure claim to be barred by laches, the district court seems to have assumed that the claim for maintenance and cure accrued on the date that Cooper slipped and fell: April 4, 1979. The record indicates, however, that Cooper was not incapacitated by this 1979 fall, but instead continued to work, albeit "in pain," until April 27, 1983. Cooper's cause 27, 1983, when she became "incapacitated to do a seaman's work."[4] *Vaughn*, 369 U.S. at 531. Seaman have always been accorded the right to bring suit, including serial suits, to collect

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[4] The record reflects that Cooper received some form of "compensation"paymants from Diamond M from May through September, 1983, and that Diamond M, at least at one point, viewed these payments as maintenance and cure. Whether these payments in fact constituted maintenance and cure and the total amount of maintenance and cure due Cooper are of course issues of fact to be resolved by the district court upon remand.

maintenance and cure benefits as they become due, *Pelotta*, 604 F.2d at 401, and we cannot approve the district court's apparent reasoning that Cooper hsould have sought maintenance and cure *prior* to her incapacity.[5] As Cooper's cause of action accrued in April 1983, and as she brought suit in November 1983, amending of 1984, Cooper was well within the three year statute of limitation embodied in § 763a. The district court's conclusion that Cooper's maintenance and cure slaim was time-barred therefore cannot stand.

For the above reasons, the judgment of the district court is AFFIRMED in part and REVERSED in part and REMANDED.

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[5] As the Supreme Court has recognized:"[t]he custom of providing maintenance and cure in kind and consurrently with its need has had the advantage of removing its benefits from danger of being wasted." *Farrell v. United States*, 336 U.S. 511, 519 (1949).

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PETITION FOR A WRIT OF CERTIORARI
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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JEWEL M. COOPER — Filed Mar 26, 1985

VERSUS — CIVIL ACTION NO. 83-5564

DIAMOND M COMPANY — SECTION: "K" (3)

OPINION

Defendant initially filed its motion for summary judgment on March 1, 1984, to dismiss plaintiff's claim under the Jones Act, 46 U.S.C. §688, as barred by the three year statute of limitations, and to dismiss plaintiff's general maritime law claim of unseaworthiness under the equitable doctrine of laches.

Plaintiff's injury occurred on April 4, 1979; she filed suit over four and one half years later on November 14, 1983, and accordingly, the Jones Act claim was dismissed. Defendant now re-urges its motion to dismiss plaintiff's general maritime claims of unseaworthiness and, added by amended complaint, failure to pay maintenance and cure and for punitive damages.

The parties argued defendant's motion on June 6, 1984, and on August 28, 1984. At the first hearing, the Court granted the summary judgment motion on the Jones Act claim and permitted plaintiff ten days to amend her complaint or file affidavits showing excusable delay or lack of perjudice to the defendant. Plaintiff filed an amended complaint stating she received compensation or maintenance for three years, she did not know the consequences of the three year lapse of time, that defendant had made a thorough investigation at the time of the accident, and, consequently, no prejudice resulted from the delay.

At the second hearing, plaintiff's counsel acknowledged that to defeat the laches defense, plaintiff must prove excusable delay or that the defendant was not prejudiced by the delay. However, counsel stated he had not done any discovery relating to defendant's investigation of the accident or the importance of defendant's now deceased witness. The Court ruled plaintiff's delay was not excusable and asked counsel for plaintiff to conduct discovery to determine whether defendant had been prejudiced by the delay. The Court continued the trial date and rescheduled it for April 15, 1985.

On March 7, 1985, the parites submitted a joint motion stating no further evidence or argument would be offered and asked the Court to decide the defendant's motion on the record before it, and the Court so ordered. Since the August 28, 1984 hearing, plaintiff has not conducted any discovery, or if she has, she has not presented it to the Court. Plaintiff has filed only a second amended complaint alleging a right to maintenance and cure and punitive damages, and a witness list.

The doctrine of laches applies to admiralty claims and the Court looks to the analogous three year statute of limitations contained in the Jones Act. When a plaintiff files suit after the expiration of the limitation period, the plaintiff has the burden of proving excuse for the delay or that the delay did not unduly prejudice the defendnat. *Pizani v. M/V Cotton Blossom*, 669 F.2d 1084 (5th Cir. 1982)(n.1 at 1087); *Mecom v. Lexington Shipbuilding Co.*, 622 F.2d 1209 (5th Cir. 1980); *Watz v. Zapata Off-Shore Company*, 431 F.2d 100 (5th Cir. 1970). As the Court has already ruled, plaintiff's ignorance of her right to sue, or the significance of the three year period, is not excusable

delay. *Akers v. State Marine Lines, Inc.*, 344 F.2d 217 (5th Cir. 1965).

Defendant has submitted the affidavit of its claims manager which states plaintiff's immediate supervisor before and after the accident was Herbert Boechl, who had personal knowledge of the condition of the galley where the unwitnessed accident occurred, and of plaintiff's physical condition. Mr. Boechl died on April 23, 1982, three years and 19 days after the accident. The death of an important witness may constitute prejudice. *Muller v. Lykes Brothers Steamship Co.*, 337 F.Supp. 700 (E.D. La. 1972).

To meet her burden of proof that the defendant has not been unduly prejudice by the delay, plaintiff offers 1) the first amending complaint stating that defendant made a thorough investigation at the time of the accident; and 2) her affidavit that she received compensation until terminated. Plaintiff's counsel argues defendant investigated sufficently to determine compensation was due and that defendants could have taken Mr. Boechl's statement before he died. Defendant's counsel argues compensation is paid whenever an employee is injured, and the investigation to determine an injury is less detailed than an investigation preparatory to a lawsuit.

Plaintiff has not met her burden to show defendant is not unduly prejudiced. Plaintiff offered no facts showing Mr. Boechl's testimony is not marterial, or perhaps cumulative, or that defendant's investigation was sufficient to defend this lawsuit, despite a continuance of the trial date to allow such discovery, and two requests by the Court.

Plaintiff's counsel has further argued that the claim for maintenance and cure is contractual, that laches does not bar it, and, presumably, the state prescriptive period governs. There is some authority for this position, *Loverich v. Warner Company,* 118 F.2d 690 (3rd Cir. 1941), *writ denied,* 313 U.S. 577 (1941), but the better reasoned approach is that maintenance and cure is a maritime claim and laches is applicable. *Ward v. Union Barge Line Corporation,* 443 F.2d 565 (3rd Cir. 1970); *Riddick v. Baltimore Steam Packet Company,* 374 F.2d 871 (4th Cir. 1967).

The motion of Diamond M Company for summary judgment that plaintiff's claims of unseaworthiness and failure to pay maintenance and cure are barred by laches is GRANTED.

It is so ordered.

/s/ illegable

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
March 25, 1985

(3)

Supreme Court, U.S.
FILED
APR 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1048

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEWEL M. COOPER

Petitioner

v.

DIAMOND M DRILLING

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BIREF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by petitioner can be correctly restated as follows:

1. Whether the Court of Appeals erred in applying the well-established rule that the enforcement of a newly-created statute of limitation will not violate the Constitution by divesting a vested right if it allowes a reasonable time for those affected by the statute to assert their rights; and

2. Whether the District Court and Court of Appeals erred in concluding that petitioner did not sustain her burden of proof under laches to demonstrate that her four year and eight month delay in filing suit was not excusable or did not prejudice Diamond M Company.

INTERESTED PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

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Diamond M. Company, Respondent

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OPINION BELOW

The opinion of the United States Fifth Circuit Court of Appeals appears in 799 F.2d 176 (5th Cir. 1986) and is included in the petitioner's brief as Appendix "A".

JURISDICTION

Jurisdiction of the Court is based on 28 U.S.C. Section 1254, which authorizes the review of cases in the courts of appeals by writ of certiorari. Petitioner, Jewel Cooper, seeks review of the judgment of the Court of Appeals dated September 8, 1986.

STATUTE INVOLVED

The statute involved herein is U.S.C. Section 763(a), enacted October 6, 1980, which provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is adequate with the exception of its characterization of the Court of Appeals' rationale in dismissing her unseaworthiness claim.

As reflected in the opinion of the appellant court below, the District Court ruled that the three-year limitation period of 46 U.S.C. Section 763(a) did not govern Cooper's claim, but nevertheless found that Cooper failed to carry her burden of proof under the doctrines of laches, and thus dismissed her suit. *See* 799 F.2d at 177.

The Court of Appeals agreed that Cooper did not sustain her burden of proving that her four year and eight month delay was reasonable or did not prejudice Diamond M Company, *Id.* at 178 n. 2, but disagreed with the District Court's conclusion regarding the application of Section 763(a). *Id.* at 177 n. 1.

In finding that Section 763(a) governed Cooper's claims, the Court of Appeals' decision *is not,* as suggested on page 4 Cooper's petition, "based on the fact that such retroactive application would not destroy any of her substantive rights." Rather, the Court of Appeals afforded Section 763(a) prospective application, which granted Cooper three years from the effective date of Section 763(a) -- a reasonable time for her to assert her rights within which to file suit. Since Cooper filed suit more than three years *after* the effective date of Section 763(a), her unseaworthiness claim was time-barred. *Id.* at 178. Moreover, the Court of Appeals agreed with the District Court that Cooper's unseaworthiness claim was barred by laches as well. *Id.* at n. 2.

SUMMARY OF ARGUMENT

The Court should refuse to grant a writ of certiorari to review this matter, since it does not conflict with any other decision construing the effect of 46 U.S.C. Section 763(a). The Court of Appeals followed an established rule of statutory construction by permitting maritime tort suits which had accrued prior to the effective date of Section 763(a) to be filed within three years after the effective date of this statute, or thereafter be time-barred. No other reported decision regarding the effect of Section 763(a) has involved a claim that accrued *prior* to the effective date of

the statute and suit was filed thereon *more than three years after* the effective date of the statute.

Furthermore, the lower courts' ruling on the laches issue is correct, and merely entails the application of the familiar standard for Motions for Summary Judgment under Rule 56. The conclusion of the District Court and Court of Appeals below on the laches issue represents an independant basis for the dismissal of Cooper's unseaworthimess claim, and the exercise of the Court's discretionary powers to review this issue is not justified.

ARGUMENT

Effect of 46 U.S.C. Section 763(a)

Cooper suggests on page 1 of her petition that there is a "conflict" between the Eleventh Circuit's decision in *Fordham v. Belcher Company,* 710 F.2d 709 (11th Cir. 1983) and the Ninth Circuit's decision in *Friel v. Cessna Aircraft Company,* 751 F.2d 1037 (9th Cir. 1985) and that the Fifth Circuit's opinion in this case resulted from an improper interpretation of *Friel.* See page 6 of Cooper's petition. These suggestions are spurious. *Fordham* and *Friel* differ only in result, not in principle. The Fifth Circuit's decision herein, limited to a distinct set of facts, does not call the rationale of either decision into question.

Fordham and *Friel,* the only other appellate decisions addressing the effect of 46 U.S.C. Section 763(a), involved different competing statutes of limitations. In *Fordham,* the defendant contended that Section 763(a) retroactively time-barred general maritime law negligence claims that were otherwise governed by laches. These claims had accured on November 16, 1978 and were filed on August 11,

1982. 710 F.2d at 710. *Friel*, on the other hand, involved a claim under the Death on the High Seas Act (DOHSA), 46 U.S.C. Section 761, that had accrued on July 23, 1980 and was filed on October 18, 1982. On the date the Friel claim accrued, the two-year limitation period of 46 U.S.C. Section 763 was in effect. Significantly, in *Friel* and *Fordham*, the claims had accrued prior to the effective date of Section 763(a), but suit was filed in each instance within three years of October 6, 1980, the effective date of Section 763(a).

Both counts recognized that statutes "generally operate prospectively only." *Fordham*, 710 F.2d at 710. *Friel*, 751 F.2d at 1039. However, the *Friel* Court invoked a long-recognized exception to that generality: applying statutes which are addressed to remedies or procedures to pending cases when it does not otherwise alter substantive rights. *Id.* The retroactive application of Section 763(a) in *Friel* preserved the plaintiff's claim by extending the applicable limitation period from two years to three. *Id.* at 1038. Thus, retroactive application of a Section 763(a) in that instance did not alter any substantive rights, the potential danger entailed by retrospective application of a newly-created statute of limitation. *Id.* at 1039 n. 4. The *Fordham* Court, on the other hand, cound not apply Section 763(a) retroactively because to do so would alter the plaintiffs' substantive rights. Notably, *less* than three years had elapsed from the time of *Fordham* plaintiff's accident to the filing of suit. 710 F.2d at 710.

Neither the *Fordham* Court not the *Friel* Court were confronted with the fact situation present in the instant case. Cooper's unseaworthiness claim accrued April 4, 1979, over a year and six months prior to the enactment of Section 763(a). However, she did not file suit until

November 14, 1983, more than three years after Section 763(a) took effect. Thus, over four and a half years elasped between the date of injury and the filing of suit.

In applying the three-year limitation period of Section 763(a) to Cooper's unseaworthiness claim, the Fifth Circuit did not apply the limitation period retroactively to the date her claim accrued. Rather, the Court of Appeals applied the limitation period *from* October 6, 1980, the effective date of Section 763(a). Thus, if Cooper would have filed her unseaworhtiness claim within four years and six months from the date of her injury, i.e., within three years of October 6, 1980, her claim would not have been time-barred. Ironically, if Cooper had been injured nineteen months later and she filed suit at the same time as she did in this case, Section 763(a) would have unquestionably time-barred her claim, under any interpretation of 46 U.S.C. Section 763(a).

In applying Section 763(a) to Cooper's claim, the Fifth Circuit adhered to a well-established principle of statutory construction:

> A newly-created statute of limitation would not violate the Constitution by divesting a vested right if it allows a reasonable time for those affected by the Act to asert their rights.

799 F.2d at 178 *citing Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984). The Court of Appeals reasoned that the three year limitation period of Section 763(a) was a reasonable time within which to file suit.[1]

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[1] Indeed, Congress previously made the determination that three years was a reasonable time within which to file a maritime tort claim when it enacted Section 763(a). Three years is also the limitation period

Accordingly, the court held that "a claim which accrued prior to the date of passage of Section 763(a) remains viable for three years after the date of passage of that statute and thereafter succumbs to the absolute bar impressed by Congress." *Coooper,* 799 F.2d at 178.

Long ago, in *Sohn v. Waterson,* 84 U.S. 737, 17 Wall. 596, 21 L.Ed. 737 (1873), this Court approved of the application of a newly-created statute of limitation in cases under facts similar to those herein. In *Sohn,* an Ohio citizen sued a Kansas citizen in the United States Circuit Court for the District of Kansas six years after the cause of action accrued. The Kansas defendant pled the two-year limitation period of the Kansas statute of limitations. The issue at bar was whether to apply the Kansas statute of limitations, enacted more than four years after the cause of action accrued. The Ohio plaintiff argued that the statute could not apply to actions that had accrued prior to its enactment. The Circuit Court held that since the defendant was a Kansas resident when the act took effect, the limitation period commenced from the date the act took effect, and the action could have been brought within two years afterwards. *Id.* at 738. This Court recognized that "a statute of limitations may, undoubtedly, have effect upon actions which have already accrued as well as upon actions which accrue after its passage." *Id.* After analyzing two other methods of statutory construction, the *Sohn* Court determined:

(footnote 1 continued)
utilized under the Jones Act, 46 U.S.C. Section 688, which governed Cooper's negligence claim against Diamond M arising out of the same incident. Under the doctrine of laches, the limitation period of the Jones Act is the analogous limitation period. *See McAllister v. Magnolia Petroleum Corporation,* 357 U.S. 221, 224, 78 S.Ct. 1201, 1204, 2 L.Ed.2d 1272 (1958).

> [a] third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of *Ross v. Duval*, 13 Pet. 62, and *Lewis v. Lewis*, 7 How. 778. In those cases certain statutes of limitation -- one in Virginia and the other in Illinois -- had originally excepted from their operation nonresidents of the state, but this exception had been afterwards repealed; and this court held that the non resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. "The question is," says Ch. J. Taney, "from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.

Id. at 738-739.

Since *Sohn* your Honors have consistently recognized:

> [i]t is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.

Wheeler v. Jackson, 137 U.S. 245, 255, 11 S.Ct. 76, 78, 34 L.Ed. 659 (1890)(citations omitted). *See also United States v. Morena*, 245 U.S. 392, 397, 38 S.Ct. 151, 152, 62 L.Ed.

359 (1918); *Capitan Grande Band of Mission Indians v. Helix Irrigation District,* 514 F.2d 465, 468 (9th Cir.), *cert. den.,* 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975); *Carscadden v. Territory of Alaska,* 105 F.21d 377, 380 (9th Cir. 1939)).

Neither the *Friel* or *Fordham* Courts considered the rule of construction endorsed by this Court in *Sohn,* and indeed, could not have been expected to because in both cases the plaintiffs had filed suit within three years after the enactment of 46 U.S.C. Section 763(a). The Fifth Circuit's rationale in this case does not conflict with any decision addressing Section 763(a), and is consistent with numerous decisions of this Court interpreting statutes of limitation under similar circumstances.

Diamond M Company further submits that this Court should not exercise its descretion to review this case since the instant decision will have insignificant impact. At present, over five years and six months have elapsed since the passage of 46 U.S.C. Section 763(a). Surely, very few, if any, unseaworthiness claims occurring prior to October 6, 1980, are pending in the lower courts. This case simply will not have such an impact as to warrant the invocation of discretionary jurisdiction.

Laches

The District Court below dismissed Cooper's unseaworthiness claim on the basis of laches. Under the doctrine of laches, if suit is not filed within the analogous limitation period, the plaintiff has the burden of proving that the delay in filing suit was excusable, or that the defendant was not prejudiced by the delay. *Watz v. Zapata off-Shore Company,* 431 F.2d 100, 111 (5th Cir. 1970).

As stated in the Fifth Circuit's opinion, the District Court found that Cooper failed to demonstrate either that Diamond M was not prejudiced by the excessive delay in filing suit, or that the delay was excusable. 799 F.2d at 177. *See also* Supplemental Appendix (Opinion of the District Court).

Diamond M. Company, in support of its Motion for Summary Judgment, submitted the affidavit of its claim manager, Kenneth Bradley. Bradley's affidavit established that Cooper's supervisor, Hubert Boeckle, had died on April 23, 1982 -- over three years after Cooper's cause of action accrued. Had Cooper filed suit timely, Diamond M would have been able to perpetuate testimony of Boeckle, a crucial witness that would have had knowledge of the state of the equipment allegedly leading to Cooper's accident and her post-accident physical condition as well. *Cooper,* 799 F.2d at 177.

The District Court concluded:

> Plaintiff has not met her burden to show defendant is not unduly prejudiced. Plaintiff offered no facts showing Mr. Boeckle's testimony is not material, or perhaps cummulative, or that defendant's investigation was sufficient to defend this lawsuit, despite a continuance of the trial date to allow such discovery, and two requests by the Court.

See Supplemental Appendix at page A-3.

The Court of Appeals concurred with the District Court's conclusion, stating:

> We agree with the district court that, in the absence of application of Section 763(a), Cooper

> cannot sustain her burden of proof under laches to show reasonable delay and absence of prejudice. Thus, this is not a case which would be "otherwise viable under the doctrine of laches."

799 F.2d at 178, n. 2.

Cooper's petition fails to establish any of the justifications under Supreme Court Rule 17 requiring a discretionary review of the lower courts' treatment of the laches issues. Cooper simply did not make the necessary factual showing required by Federal Rule of Civil Procedure 56(e) although the trial was continued and the District Court specifically requested discovery from Cooper on the issue of prejudice on two occasions. *Id.* at 177. As the Court of Appeals stated, after the Joint Motion for Summary Judgment was filed on March 7, 1985, "Cooper had submitted no additional affidavits or depositions contradicting the evidence of prejudice contained in the Bardley affidavit." *Id.* The lower courts' treatment of the laches issue is consistent with this Court's recent decision of *Celotex Corporation v. Catrett*, ____U.S.____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In *Celotex*, your Honors held:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made and relies solely on the "Pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made in support as is provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file" designate

> "specific facts showing that there is a genuine issue for trial."

Id. at 2553.

The rulings on the laches issue do not involve any novel questions of law, nor is there a conflict between the circuits.[2] Of course, the lower courts' ruling on laches represents another bais for the dismissal of Cooper's unseaworthiness claim. Thus, should your Honors question the rationale of the Fifth Circuit Court of Appeals on its interpretation of 46 U.S.C. Section 763(a), a dismissal of Cooper's unseaworthiness claim, based on laches, remains appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Jewel M. Cooper should be denied.

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[2] It is noted that the statements made by Cooper on page 10 of her brief regarding the reporting of the accident, failure to take corrective measures, etc. are totally unsupported by the record and should be disregarded.